

¶ 6.29[2] Applicability of Public Law 86-272 to Income from Foreign Commerce

By its terms, [Public Law 86-272](#) does not apply to income from foreign commerce, because the operative provision restricting state taxation refers only to a “net income tax on the income derived ... from *interstate* commerce.”⁹²¹ We are unaware, however, of any state that has taken the position that the protection of the statute does not, in fact, extend to income from foreign commerce. Indeed, if [Public Law 86-272](#) were construed to apply to interstate commerce but not to similarly situated foreign commerce, it would raise serious questions under U.S. international trade rules and U.S. bilateral tax treaty obligations.

First, applying [Public Law 86-272](#) to tangible personal property shipped from other states but not to tangible personal property shipped from foreign countries, on the ground that the statute did not apply to foreign commerce, would appear to constitute a *prima facie* violation of international trade rules forbidding discrimination against foreign products.⁹²²

Second, limiting the protection of [Public Law 86-272](#) to domestic commerce would arguably violate the nondiscrimination provision of the tax treaties that the United States has concluded with many foreign trading partners. Article 24 of the U.S. Model Tax Treaty⁹²³ provides:

Nationals of a Contracting State shall not be subjected in the other Contracting State to any taxation ... that is more burdensome than the taxation ... to which nationals of that other state in the same circumstances ... are or may be subjected.⁹²⁴

Unlike most provisions of the U.S. Model, the nondiscrimination provisions “apply to taxes ... imposed by a Contracting State or a *political subdivision or local authority thereof*.”⁹²⁵ Accordingly, if a state took the position that a foreign vendor of tangible personal property whose activities in the state did not exceed “solicitation of orders” under [Public Law 86-272](#) was nevertheless subject to a corporate net income tax in the state, one could argue that this would constitute a treaty violation where such treaty obligations were applicable. In those circumstances, a foreign seller making sales into a U.S. state would be subjected to more burdensome taxation than a similarly situated domestic seller making sales into the same state.

To be sure, one might suggest that discrimination in favor of domestic commerce over foreign commerce does not constitute discrimination in favor of domestic nationals against foreign nationals, because foreign nationals are free to engage in domestic commerce and domestic nationals are accorded no special treatment when they engage in foreign commerce. Accordingly, this would not constitute “tax discrimination” within the meaning of the treaty.⁹²⁶ We believe, however, that most courts would view this hypothetical possibility as insufficient to overcome what is in practical terms likely to be a substantial discrimination against non-U.S. taxpayers.⁹²⁷

The Multistate Tax Commission (MTC), in its Statement of Information Concerning Practices of Multistate Tax Commission and Signatory States Under [Public Law 86-272](#),⁹²⁸ declares that signatory states “will apply the provisions of [Public Law 86-272](#) and of this Statement to business activities conducted in foreign commerce.”⁹²⁹ Accordingly, at least for those signatory states, [Public Law 86-272](#) and the principles the MTC has adopted apply equally to foreign and domestic taxpayers. The MTC presents the issue as one of “volunteerism,” declaring that “[Public Law 86-272](#) ... does not directly apply to foreign commerce,”⁹³⁰ but the states are “free ... to apply the same standards set forth in the Public Law ... to business activities in foreign commerce to ensure that foreign and interstate commerce are treated on the same basis.”⁹³¹ We believe the states are not “free” to decide whether or not to apply [Public Law 86-272](#) to foreign vendors and that any state failing to do so would be violating U.S. international trade rules barring discrimination against foreign products and, at least in some instances, bilateral treaty obligations.

⁹²¹ [Pub. L. No. 86-272, § 101\(a\)](#), 15 USC § 381(a) (emphasis supplied).

⁹²² See W. Hellerstein, “Implications of the Uruguay Round Multilateral Trade Agreements for American Subnational Taxation of International Commerce,” 49 Bull. For Int’l Fiscal Documentation (No. 1) 3 (1995).

⁹²³ Of course, the Model Treaty is just that, a “model,” although most of the treaties that the United States has concluded with other countries generally follow the model.

⁹²⁴ U.S. Model Tax Income Tax Convention of Nov. 15, 2006, art. 24(1).

⁹²⁵ U.S. Model Tax Income Tax Convention of Nov. 15, 2006, art. 24(6) (emphasis supplied).

⁹²⁶ See M. Graetz & A. Warren, “Income Tax Discrimination and the Political and Economic Integration of Europe,” 115 Yale L.J. 1186, 1195–1198 (2006); A. Warren, “Income Tax Discrimination Against International Commerce,” 54 Tax L. Rev. 131 (2001).

⁹²⁷ Whether such favoritism for domestic over foreign commerce might also violate the Commerce Clause is a trickier question, because it is difficult to see how Congress’s action under the “affirmative” Commerce Clause in favoring domestic over foreign commerce can amount to a violation of the “dormant” Commerce Clause. See [¶ 4.25](#).

⁹²⁸ Statement of Information Concerning Practices of Multistate Tax Commission and Signatory States Under [Public Law 86-272](#), 3d Rev., July 27, 2001, reproduced in [Appendix D](#) of Volume I of this treatise and available at www.mtc.gov.

⁹²⁹ Statement of Information Concerning Practices of Multistate Tax Commission and Signatory States Under [Public Law 86-272](#), 3d Rev., July 27, 2001, reproduced in [Appendix D](#) of Volume I of this treatise and available at www.mtc.gov.

⁹³⁰ Statement of Information Concerning Practices of Multistate Tax Commission and Signatory States Under [Public Law 86-272](#), 3d Rev., July 27, 2001, reproduced in [Appendix D](#) of Volume I of this treatise and available at www.mtc.gov.

⁹³¹ Statement of Information Concerning Practices of Multistate Tax Commission and Signatory States Under [Public Law 86-272](#), 3d Rev., July 27, 2001, reproduced in [Appendix D](#) of Volume I of this treatise and available at www.mtc.gov. (emphasis supplied).